

Final Examination
Health Law – Fall, 2003
Professor Wolfberg

INSTRUCTIONS

Well, here it is – final exam time again. It's hard to believe this semester is over already.

Based on everyone's performance in class, I am confident that you are well-prepared for this final.

This examination – like the course – is designed to survey your knowledge on the broad range of subjects we covered during the semester.

If you are typing your exam, please double-space your answers. If you are writing your exam, please write your answers legibly in blue books. Please remember to put your anonymous number on the first page of your typed answer. If you use blue books, please put your anonymous number on the front of each book. You are free to utilize the textbook, the outside materials and your class notes.

This examination is in two parts. Part I consists of two fact patterns which call for essay answers. Part II consists of ten questions requiring short answers. There is no page limit to your answers, but as a rough guideline, each question in Part I might consume about 3-5 double-spaced pages or 6-10 blue book pages for each answer. Again, as a rough guideline, the answer to each question in Part II might consist of three or four sentences or a short paragraph or two. Part I and Part II are each worth 50% of the grade.

Good luck! It has been a pleasure teaching this class and I extend to you my best wishes for the rest of your law school career, on the bar exam and after.

Part I
Short Essays

Fact Pattern 1

Dr. Ben Dover is a proctologist with a very busy and lucrative practice. He has built his practice, among other ways, by serving a large geriatric and nursing home population. Dr. Dover recently purchased and moved into a large, 5,000 square-foot professional building adjacent to the Derriere Memorial Hospital. Dr. Dover also hired several employee physicians and assistants to meet his increasing patient volume. Although Dr. Dover filled much of the space in his new office building, there is over 2,000 square feet remaining, which he hopes to fill with additional staff and exam rooms.

However, after several months in his newly-expanded practice, Dr. Dover determines that the increased overhead of his new office building, physicians and staff is not being met by his existing patient volume. Dr. Dover hires a practice management consultant, Seymour Butts, to assist him in devising ways to increase his patient volume and defray some of the significant overhead costs he now incurs. Dr. Dover and Mr. Butts enter into a six-month “personal services agreement” for Mr. Butts’ consulting services. The contract includes the following provisions:

Duties of Consultant. Consultant (Seymour Butts) shall assist the Client (Dr. Ben Dover) in negotiating referral arrangements with family practice physicians, nursing homes and other sources of patients, and shall provide advice and recommendations to Client on methods to increase his patient volume and practice profitability.

Compensation. Client shall pay Consultant a flat fee of \$10,000 for the services set forth in this Agreement. In addition, Client shall pay Consultant additional monthly bonuses based on increased patient volume in any given month, according to the following fee schedule:

Increase of 1-30 patients	\$2,500 bonus
Increase of 31-60 patients	\$5,000 bonus
Increase of 61+	\$10,000 bonus

Dr. Dover saw a substantial increase of patients every month and paid Mr. Butts bonuses totaling \$40,000. Dr. Dover billed various payors and insurers for these services, and, more specifically, filed Medicare and Medicaid claims for the services he rendered to the patients generated by Seymour Butts.

Question 1

Please analyze whether Dr. Dover and Mr. Butts each face potential liability under Federal “fraud and abuse” laws. Please identify which laws could be implicated for each person’s conduct, and what civil, administrative and/or criminal remedies might exist under those laws.

Fact Pattern 2

Dr. I.P. Dailey is a urologist in Big Falls East (BFE), Pennsylvania. On October 7, 2002, Dr. Dailey performed a surgical procedure on his patient, P. Moore Freely. Dr. Dailey has medical staff privileges at the U. Rhine Memorial Hospital (URMH) and performed the surgery at that facility. Mr. Freely was admitted to URMH the day before the surgery and was discharged the day following the surgery.

Mr. Freely is covered by his employer's health insurance. A few years ago, his employer, in an effort to cut costs, switched from an indemnity-type health insurance plan to a Health Maintenance Organization (HMO) known as PEUSTO (Patch 'Em Up and Ship 'Em Out) Health Plan. Mr. Freely's employer was sold on PEUSTO Health Plan after seeing their numerous television commercials with a cute talking duck.

Anyway, cute talking ducks aside, PEUSTO Health Plan is an independent practice association (IPA) model HMO. It does not operate its own hospital or employ its own physicians, but contracts with doctors and hospitals to provide services to their enrollees. PEUSTO Health Plan had a contract in place both with Dr. Dailey and with URMH.

Mr. Freely developed post-surgical complications, including an infection (which appeared to be caused by an unsterile surgical instrument supplied by URMH). He subsequently required several corrective surgeries (performed by a physician other than Dr. Dailey) and spent a total of 6 weeks in the hospital related to the post-surgical complications from his original surgery.

In December, 2003, Mr. Freely decided to hire an attorney to explore whether he might have a viable malpractice case. He turned over his telephone book, and, as fate would have it, there on the back cover was a picture of a group of menacing-looking attorneys whose ad said "No Recovery, No Fee – Call the Law Firm of Dewey, Cheatem & Howe at 1-800-SUE-DOCS." Mr. Freely could hardly contain his glee as his fingers dialed the phone. Thoughtfully, he even muted the sound on the TV while watching the Jerry Springer Show (Topic: "Men Who Play Late Night Bingo With Their Girlfriend's Grandmothers and the Women Who Love Them.")

Attorney Howe takes Mr. Freely's case and begins to research the potential tort causes of action he may have. The first order of business undertaken by Attorney Howe is to retain an expert witness. He hires Dr. Stan Topee, a leading urologist from Fargo, North Dakota to review the case and serve as a testifying expert. Following receipt of a written report from Dr. Topee that supports his case, Attorney Howe plans to file a complaint in the county Court of Common Pleas in BFE, Pennsylvania.

Question 2

Please analyze whether Attorney Howe, on Mr. Freely's behalf, might have viable tort claims against (1) Dr. Dailey, (2) the U. Rhine Memorial Hospital and (3) the PEUSTO Health Plan, and discuss whether the Court should accept expert testimony from Dr. Topee, since his practice is based so far away from Pennsylvania.

Part II
Short Answers

1. Please briefly define and describe the elements of a hospital's basic statutory duties under the Emergency Medical Treatment and Active Labor Act (EMTALA).
2. Please briefly describe the analysis in determining whether the "public disclosure bar" in a *qui tam* case brought under the federal False Claims Act applies in a given case.
3. Please discuss the major differences between the fee-for-service and prospective payment systems in health care.
4. Please identify and briefly describe the three basic permitted uses of "protected health information" (PHI) by health care providers under the HIPAA privacy rule.
5. Two doctors are talking about a patient's care between themselves while standing in a busy hallway of the hospital. Their conversation is overheard by several people who are walking by as they are looking for a different patient's room to visit a family member. What concept in the HIPAA privacy rule applies to this type of disclosure, and is it a violation?
6. Which type of Health Maintenance Organization (HMO) is more likely to be granted tax-exempt status by the IRS – an independent practice association (IPA) model HMO (where the HMO contracts with hospitals and physicians to provide services to its enrollees) or a staff model HMO (which employs physicians and operates its own hospital), and why?
7. Please briefly describe the major duties owed by a director of a non-profit hospital to the organization.
8. What due process arguments can a physician raise in a disciplinary action brought by his or her state medical licensing board if the same individuals involved in deciding to prosecute the physician also participate in the ultimate adjudication of the case?
9. Please briefly describe two major differences between the Medicare and Medicaid programs.
10. In Fact Pattern 2 (in Part I of this exam), assume that Attorney Howe makes a discovery request for copies of documents that show that Dr. Dailey's privileges were temporarily suspended after a meeting of a quality assurance committee at URMH. Briefly, on what grounds can Dr. Dailey seek to prevent the discovery of these documents?